



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 11, 1998

Mr. Charles M. Allen, II
City of Richardson
Legal Office
P.O. Box 831078
Richardson, Texas 75083-1078

OR98-2174

Dear Mr. Allen:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 117931.

The City of Richardson (the "city") received a request for a copy of all police reports and witness statements regarding a certain aggravated robbery which occurred on July 12, 1996. You claim that the requested information is excepted from disclosure under sections 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. You allege that the requestor's law firm represents this particular inmate. Thus, in addition to the exceptions, you claim that the department need not respond to the request under section 552.028 of the Government Code. We have considered the arguments you have made and reviewed the submitted representative sample of documents.

First, you assert that you need not release the information pursuant to section 552.028 of the Government Code. Section 552.028 provides:

(a) A governmental body is not required to accept or comply with a request for information from an individual who is imprisoned or confined in a correctional facility.

(b) Subsection (a) does not prohibit a governmental body from disclosing to an individual described by that subsection information held by a governmental body pertaining to that individual.

(c) In this section, "correctional facility" has the meaning assigned by Section 1.07(a), Penal Code.

Gov't Code § 552.028 (as added by Acts 1995, 74th Leg., ch. 302, § 1).

By enacting section 552.028, the legislature intended to prevent inmates from using information obtained through the Open Records Act "to file bogus income tax returns on correctional officers, harass nurses at their home addresses, and send mail to the homes of Texas Department of Criminal Justice employees." Tex. Sen. Criminal Justice Comm., Bill Analysis, Tex. H.B. 949, 74th Leg., R.S. (1995) (quoting from "Background") (available through Senate Research Center). After careful consideration and given the stated purpose of section 552.028, we do not believe that the legislature intended to prevent an attorney, who is subject to rules of professional responsibility, from requesting information on behalf of an inmate whom he is representing. Accordingly, we conclude that section 552.028 does not relieve a governmental body of its obligation to accept and comply with an open records request from an *attorney* who is making such a request on behalf of an inmate whom he is representing. Consequently, we now address the exceptions you raise.

Section 552.103(a) applies to information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

Additionally, section 552.103(b) provides that the state or a political subdivision is considered to be a party to litigation of a criminal nature until the defendant has exhausted all post-conviction remedies in state and federal court.

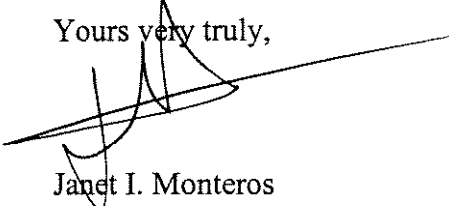
The governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 at 5 (1989). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). You state "the documents deal with criminal litigation for which all appellate and post conviction remedies, in state and federal court, have not been exhausted; and/or civil litigation the result of the criminal conviction; and/or quasi-criminal litigation in the nature of a Habeas Corpus action in state and/or federal court." You do not provide any further information in the instant matter which indicates that litigation is realistically contemplated and more than mere conjecture.

Consequently, you have not made the requisite showing necessary for purposes of section 552.103(a).

Additionally, we note that generally, a governmental body claiming an exception under section 552.108 must reasonably explain, if the information does not supply the explanation on its face, how and why the release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(a)(1), (b)(1), .301(b)(1); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). In this instance, you have not stated that the requested information pertains to a pending criminal investigation or prosecution so as to demonstrate that its release would interfere with the detection, investigation, or prosecution of crime. Nor have you demonstrated that the requested information relates to a criminal investigation that *concluded in a result* other than a conviction or deferred adjudication. *See* Gov't Code § 552.108(a)(2), (b)(2). You must therefore release the requested information in its entirety.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Janet I. Monteros
Assistant Attorney General
Open Records Division

JIM/nc

Ref.: ID# 117931

Enclosures: Submitted documents

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(w/o enclosures)